STATE OF MICHIGAN

COURT OF APPEALS

STANLEY W. CHEFF, Plaintiff-Appellant,	UNPUBLISHED April 24, 2012
v	No. 300231 Kent Circuit Court
MARGARET I. CHEFF, Defendant-Appellee.	LC No. 09-012350-DO

Before: METER, P.J., and SERVITTO and STEPHENS, JJ.

PER CURIAM.

Plaintiff appeals by leave granted from an order voiding a postnuptial agreement signed by the parties. We affirm.

The facts that are pertinent for our resolution of this appeal are not disputed. The parties married in February 1988 and signed a postnuptial agreement in May 1988. It provided, in paragraph 14:

> In the event of divorce, separation, or decree of separate maintenance, each party waives all alimony and all right to any award or share of property of the other, except as specifically provided in this paragraph. Upon entry of a decree of divorce or separate maintenance, the parties mutually agree that each may select and shall retain from his or her separate assets at that time, assets equal to the amount of the net separate property owned by each party as disclosed on Exhibits A and B, respectively. Jointly held property shall be divided on the basis of each party's contribution. If contribution cannot be determined, such property shall be divided equally between the parties.
>
> In addition, Mrs. Cheff shall be entitled to the greater of $200,000 or 25% of the amount by which Mr. Cheff's net separate property then exceeds $3,917,811, but application of such 25% shall not result in a transfer of more than $1,000,000 to Mrs. Cheff. Such transfer shall be made over a period of five years. Likewise, Mr. Cheff shall be entitled to 25% of the amount by which Mrs. Cheff's net separate property then exceeds $82,100, but application of such 25% shall not result in a transfer of more than $1,000,000 to Mr. Cheff. If divorce, separation, or a decree of maintenance is entered after 20 years of marriage, the $200,000

minimum provided above shall be increased by the percentage increase in the Consumer Price Index . . . .

The parties recognize that the decisions of Michigan courts suggest that this clause may not be enforceable. They nevertheless have included their agreement herein since they believe that such agreements made by fully informed, mature persons ought to be enforceable and honored.

In November 2000, the parties amended paragraph 14 to read, in its entirety:[1]

In the event of divorce, separation, or decree of separate maintenance, each party waives all spousal support, alimony, separate maintenance, suit money, or any other form of payment and all right to any award or share of property of the other, except as specifically provided in this paragraph. Upon entry of a decree of divorce or separate maintenance, the parties mutually agree that each shall retain his or her separate property except as provided in this paragraph. Jointly held property shall be divided on the basis of each party's contribution. If contribution cannot be determined, such property shall be divided equally between the parties. Mrs. Cheff shall receive a total of $1,000,000 in assets selected by Mr. Cheff from his separate property or by the receipt of joint property by Mrs. Cheff as provided above. Such payment shall be made over a period of five (5) years.

Plaintiff filed for divorce in November 2009. Defendant challenged the enforceability of the postnuptial agreement, and a hearing took place in May 2010. The court declined to find the agreement void as against public policy, stating simply that "the original postnuptial agreement and amendment were not made in contemplation of divorce." However, the court voided the agreement and amendment on other grounds, finding that there had been inadequate disclosures of assets by plaintiff. The court further stated:

[T]he [c]ourt finds that the provisions of the postnuptial agreement are not equitable and take significant advantage over the wife in a long-term marriage, prohibiting any consideration from [sic] spousal support, and including terms that the [c]ourt finds not to be an equitable agreement that can be upheld.

Plaintiff now appeals.

We agree with defendant that the postnuptial agreement was void as against public policy.[2] Accordingly, we affirm the decision of the lower court.

[1] Plaintiff states in his appellate brief that "[f]or the purpose of this appeal, appellant seeks review of only the trial court's ruling on the May 3, 1988 agreement, not the November 3, 2000 amendment."

In *Randall v Randall*, 37 Mich 563, 571 (1877), the Michigan Supreme Court indicated that postnuptial agreements made in contemplation of divorce, by a couple not yet separated, are void as against public policy. The Court stated:

> The chief difficulties with such contracts are encountered when they undertake to provide for a separation of the parties and a breaking up of the marriage either with or without a divorce. It is not the policy of the law to encourage such separations, or to favor them by supporting such arrangements as are calculated to bring them about. It has accordingly been decided that articles calculated to favor a separation which has not yet taken place will not be supported . . . . [*Id.*]

In *In re Berner's Estate*, 217 Mich 612, 620-621; 187 NW 377 (1922), the Court reaffirmed this principle, once again distinguishing between couples already separated and couples still together:

> An agreement to effectuate a separation or *in contemplation of a future separation* is void as against public policy. . . . The agreement should be in recognition of an existing separation. Separation involves a cessation of domestic intercourse and cohabitation. . . . It is to be found as a fact from the intention and conduct of the parties. [Emphasis added.]

In *Day v Chamberlain*, 223 Mich 278, 281; 193 NW 824 (1923), the Court stated:

> The separation agreement [at issue] was void as against public policy. It was made, not in recognition of any existing separation, but to effectuate, and in contemplation of, a future separation. The husband and wife were living and cohabiting together at the time and continued so to do for nearly two months thereafter. It is well settled that a separation agreement so made is void.

The Court went on to state that "[i]f a contract is void as against public policy, the court will neither enforce it while executory, nor relieve a party from loss by having performed it in part." *Id*. (internal citation and quotation marks omitted).

In the more recent case of *Wright v Wright*, 279 Mich App 291, 294; 761 NW2d 443 (2008), the married couple at issue were not separated at the time a postnuptial agreement was signed, although the marriage was under strain. The plaintiff filed for divorce approximately eight months after the agreement was signed. *Id*. "He did not first separate from defendant or leave the marital home . . . ." *Id*. at 294-295. In upholding the lower court's ruling that the postnuptial agreement was void, this Court stated, "a couple that is maintaining a marital relationship may not enter into an enforceable contract that anticipates and encourages a future separation or divorce." *Id*. at 297. The Court also indicated that "the trial court correctly determined that the postnuptial agreement at issue was calculated to leave plaintiff in a much more favorable position to abandon the marriage." *Id*. The Court went on to state:

[2] This issue presents a question of law. We review questions of law, including questions of contract interpretation, de novo. *Flint Cold Storage v Dep't of Treasury*, 285 Mich App 483; 776 NW2d 387 (2009); *In re Smith Trust*, 274 Mich App 283, 285; 731 NW2d 810 (2007).

> Plaintiff relies extensively on this Court's recent opinion in *Lentz v Lentz*, 271 Mich App 465, 721 NW2d 861 (2006), but he fails to acknowledge that *Lentz* is fundamentally distinguishable from the case at bar. *Lentz* dealt with a couple that had separated and wanted to divide marital assets in anticipation of their imminent divorce. *Id*. at 467, 473. The Court in *Lentz* specifically distinguished cases that involved postnuptial agreements that were not entered into by separated parties, and it specifically recognized that those cases met with much stricter legal scrutiny than postnuptial, postseparation agreements that essentially settled property issues arising in ongoing or imminent divorce litigation. *Id*. at 473-474 & n 5. The higher scrutiny was applied to cases that involved the property rights in a spouse's inheritance, and courts in those cases generally conditioned the enforceability of the provisions on a finding that each party, and the contract itself, expressed a desire to maintain the marital covenant. *Id*.; see *Rockwell v Estate of Rockwell*, 24 Mich App 593, 597-598; 180 NW2d 498 (1970). Therefore, the trial court did not clearly err by finding that the agreement contemplated and encouraged the separation and divorce of a married couple, and it correctly ruled that the agreement was void as against public policy. *Day*, *supra*. [*Wright*, 279 Mich App at 298.]

The parties in the present case were not separated at the time of signing the agreement. Moreover, the agreement "contemplated . . . the . . . divorce of a married couple" in that it contained explicit provisions pertaining to alimony and property distribution in the event of divorce or separation. *Id*. In addition, the May 1988 agreement did not explicitly "express[] a desire to maintain the marital covenant." *Id*.; cf. *Ransford v Yens*, 374 Mich 110, 116; 132 NW2d 150 (1965). As such, the agreement fell within the parameters of *Wright* and was void as against public policy.

Plaintiff suggests that *Ransford* mandates a finding that the agreement here was valid, because the Court in *Ransford* upheld a postnuptial agreement. See *id*. However, *Ransford* is nonbinding because it was decided by an equally divided Court. See *Le Vasseur v Allen Electric Co*, 338 Mich 121, 124; 61 NW2d 93 (1953). At any rate, we find *Ransford* sufficiently distinguishable because in that case, the parties were attempting to resolve a dispute that had arisen with regard to "their respective rights both as to the property owned severally and as to the property acquired jointly during their marriage." *Id*. at 115; see also *id*. at 111.[3] Here, the agreement was not entered into to resolve a specific dispute. We also find *Rockwell* sufficiently distinguishable because the agreement in *Rockwell* did "not contain any reference to separation found offensive in *Ransford*. Indeed, it was entered into for a purpose found salutary in *Ransford*, namely, to provide for disposition of property favoring the children by previous marriages of the parties." *Rockwell*, 24 Mich App at 599. The agreement at issue in the present case clearly and unequivocally provided for property distribution and alimony arrangements

[3] As noted in *Rockwell*, 24 Mich App at 596, there is a "judicial policy favoring settlement of controversies over litigation."

"[in] the event of divorce [or] separation . . . ." It contained a clear reference to divorce and separation. Cf. *id.*

We find *Wright* to be dispositive[4] and we thus affirm the decision of the lower court, albeit on alternative grounds. See *Klooster v Charlevoix*, 488 Mich 289, 310; 795 NW2d 578 (2011) (appeals court may affirm lower tribunal on alternative basis).[5] Given our resolution of this issue, we need not address the additional arguments raised on appeal.

Plaintiff also contends that we should not resolve the public-policy issue because defendant did not file a cross-appeal. However, a party need not file a cross-appeal to argue an alternative basis to affirm, even if that basis was rejected by the lower court. *Kosmyna v Botsford Community Hosp*, 238 Mich App 694, 696; 607 NW2d 134 (1999).

Affirmed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Deborah A. Servitto
/s/ Cynthia Diane Stephens

[4] We note that *Wright* is binding on us under MCR 7.215(J)(1).

[5] We reject plaintiff's argument that the approval, in general, of prenuptial agreements in *Rinvelt v Rinvelt*, 190 Mich App 372, 382; 475 NW2d 478 (1991), mandates reversal in this case. We decline to extend *Rinvelt* to postnuptial agreements.